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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1919 — 70-268

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

vs.

THE DAY COMPANIES, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

To the United States Court of Appeals
for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	2
Status of Dulaney	3
The Covenant Did Not Extend Beyond Permissible Geographic Area	4
The Public Policy of Georgia Has Not Been Ignored	8
Conclusion	8

Table of Cases Cited

Central Georgia Land & Lumber Company v. Exchange Bank of Macon, 101 Ga. 345, 28 SE 863	3
Daniel v. Maddox-Rucker Banking Company, 124 Ga. 1063, 53 SE 573	3
Fox v. Avis Rent-A-Car Systems, Inc., 223 Ga. 571, 156 SE2d 910	5, 6, 7
Hood v. Legg, 160 Ga. 620, 128 SE 891	4
Kutash v. Gluckman, 193 Ga. 805, 20 SE2d 128	5
Legg v. Hood, 154 Ga. 28, 113 SE 642	4, 5
Meredith v. City of Winter Haven, 320 U.S. 328	2
Taylor Freezer Sales Company, Inc. v. Sweeden Freezer Eastern Corporation, 225 Ga. 160, 160 SE2d 356	7
Vandenbark v. Owens Illinois Glass Co., 311 U.S. 538	2

Miscellaneous Cited

6 R.C.L. 798, § 200	4
397 U.S. 1111, 89 Sup. Ct. 993, 22 L. Ed. 2d 122	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1813

CLAUD T. PATAT, JR., JOHN L. FARRIS and
PATAT PLYWOOD CORPORATION,
Petitioners,

vs.

THE DAY COMPANIES, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

To the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

Petitioner's Statement of the Case is basically correct and accepted by the Respondent with the exception of Petitioner's comment concerning the decision of the Fifth Circuit Court of Appeals.

The facts necessary to a determination of this case are adequately set forth in the opinion of District Judge Sidney O. Smith, Jr. in his order dated July 13, 1970, set out as Appendix 1 to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The decision of the Fifth Circuit Court of Appeals is not in conflict with applicable Georgia law, but on the contrary, is fully supported by Georgia decisions cited by the District Court and the Court of Appeals.

The Fifth Circuit Court of Appeals did not ignore this Court's admonition in **Vandenbark v. Owens Illinois Glass Company,** 311 U. S. 538 and **Meredith v. City of Winter Haven,** 320 U. S. 328. **Vandenbark** involved a ruling by the Sixth Circuit Court of Appeals that cases in tort brought in Federal Courts on ground of diversity of citizenship are ruled by the State law as declared by the State's highest court when the judgment of the trial court is entered and not by the State law as so declared at the time of entry of the Appellate Court's order of affirmance or reversal. In that particular case, after the trial court had dismissed the plaintiff's petition, the Ohio Supreme Court reversed its former decisions, The Sixth Circuit Court of Appeals applied the law in effect in Ohio at the time of the trial court's action and not at the time the appeal was heard. This was the ruling which this Court considered on Certiorari and reversed.

Meredith concerned a decision of the Fifth Circuit Court of Appeals which declined to exercise its jurisdiction on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida Courts had left in a state of uncertainty. This Court, on Certiorari, held at page 234:

> "But we are of opinion that the difficulties of ascertaining what the State courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a Federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."

The Fifth Circuit Court of Appeals in the instant case did apply the decisions of the Supreme Court of Georgia and did reach a decision. Just because Petitioner does not agree with the results reached by the Circuit Court is no reason for granting Certiorari. This case involves only the application of Georgia law to a private contract and is not a case wherein the Court of Appeads "has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

STATUS OF DULANEY

Petitioner argues that holding Dulaney Plywood Corporation was a "sales agent" is contrary to Georgia law. The District Judge stated in his opinion that the arrangement between Farris Plywood and Dulaney was unique and that "in most respects it is most akin to that of a 'sales agent' ". The trial court further said "in truth, the arrangement was a paternalistic supervision of his own creation by Dulaney, who doubtless wished for Farris to prosper over and beyond repayment of the purchase price. In any view of such a situation, the Court can only conclude that Delaney's customers were Farris' customers and vice versa, as the former had no production and the latter no market without the other."

Petitioner cites **Central Georgia Land & Lumber Co. v. Exchange Bank of Macon**, 101 Ga. 345, 28 SE 863. That case dealt with the relationship between a cotton buyer and a bank which financed him, a factual situation completely different from that existing between Dulaney and Farris.

Daniel v. Maddox-Rucker Banking Company (1906), 124 Ga. 1063, 53 SE 573, also involves a relationship between a bank and a cotton buyer. The bank had agreed to pur-

chase cotton from the buyer at a certain price and to pay the defendant a commission of twenty-five cents per bale in addition to the specified price per pound. This relationship is in no way akin to that existing between Dulaney and Farris in the instant case.

THE COVENANT DID NOT EXTEND BEYOND PERMISSIBLE GEOGRAPHIC AREA

Petitioner cites several Georgia cases which deal with covenants not to compete ancillary to employment contracts. The Georgia courts have consistently made a distinction between such contracts and those incorporated in the sale of a business. This distinction goes far beyond merely holding that in the sale of a business, it is not required that the covenant be limited as to time as argued by petitioner.

The Supreme Court of Georgia in **Hood v. Legg**, 160 Ga. 620, 128 SE 891, discussed in detail the subject of the territorial limits of an agreement not to compete ancillary to the sale of a going business and the rationale behind various decisions. The Court quoted its previous ruling in the case of **Legg v. Hood**, 154 Ga. 28, 113 SE 642, holding:

> "Such covenant will be reasonable and proper if it only affords a bare protection to the party in whose favor it is made, and is not injurious to the public. 6 R.C.L. 798, § 200, and cases cited in notes 20 and 1; and where it is of such character, it may extend to all the territory covered by the business the good will of which has been sold."

The Court further held in the ruling:

> "It seems fair and just, and also conducive to business integrity, that a person who purchases a business including the good will, for the purpose of extending

its scope 'is entitled to contract with his vendors against competition from them within the territory into which he designs to extend it, and that such contract is not opposed to public policy when the area which it embraces is not greater than that which the parties may fairly anticipate the extended business will cover.'"

From this it will be seen that the Supreme Court of Georgia has held that a covenant not to compete, ancillary to the sale of a business, may cover not only the area in which the business was operating but the area in which the new purchaser intended to expand the business. The contract between Columbus Packing Company, Inc. and Farris extended only to the area in which Farris Plywood Company was then operating and certainly could not be unreasonable as to territory.

The decision in **Legg v. Hood** was cited with approval and reaffirmed in **Kutash v. Gluckman** (1942), 193 Ga. 805 (20 SE2d 128).

Petitioner cites in support of its contention that the covenant extended beyond permissible geographical area, **Fox v. Avis Rent-A-Car Systems, Inc.**, 223 Ga. 571, 156 SE2d 910. Their petition also points out at page 5 that the opinion of the Fifth Circuit Court of Appeals in the prior appearance of this case, contained no reference to **Fox**. Petitioners made this same argument in their prior Petition for Certiorari to review the previous decision of the Fifth Circuit Court of Appeals, which was denied 397 U.S. 1111, 89 Sup. Ct. 993, 22 L.Ed2d 122. In its Response to the previous petition for Writ of Certiorari, The Day Companies, Inc. stated in part:

"The petitioner argues that the Fifth Circuit Court of Appeals made no reference to **Fox v. Avis Rent-A-Car Systems, Inc.** (1967), 223 Ga. 571, 156 S.E. 2d 910, which it alleges to be the latest decision of the Su-

preme Court of Georgia. This case was cited by petitioners in their brief in the Court of Appeals and in their petition for rehearing. Obviously it was carefully considered by the Court of Appeals.

"The decision of the Court of Appeals is in accord with the decision of the Supreme Court of Georgia in the **Fox** case. In that particular case Avis filed suit against Fox alleging in two counts violations of two separate contracts between Avis and Fox. The Court upheld an agreement in Count One that Fox would 'not engage in competition with ITT or any subsidiary of ITT in any phase of the vehicle rental or leasing business or any other business in which employee is engaged at the time of' the termination of his employment with the plaintiff for a period of two years after the termination date 'in any city in the United States where employee was employed or stationed by ITT or any subsidiary of ITT.' The second count which the Supreme Court held to be fatally defective contained language in which Fox agreed 'not to engage in competition with the company or any subsidiary of the company for a period of two years after such termination date in any city of the United States wherein he was, in the five year period preceding such termination date, employed or stationed by the company or any subsidiary of the company.' The Court held the contract was fatally defective and void because it is indefinite and for that reason unreasonable in the description of the prohibitive business. It will be noted that this involved a contract not to engage in competition with International Telephone and Telegraph Corporation or any subsidiary of the company. The contract dealt with in the second count did not restrict it to any business of ITT or any subsidiary in which the employee Fox had been engaged, but related to competition with

the company or any subsidiary of the company. It was obviously this language which the Court found to be too broad.

"The **Fox** case is easily distinguishable from the instant case. Here we are dealing with a situation where John L. Farris was the president and principal stockholder of Farris Plywood Company. This was the only business in which he agreed not to compete. Columbus Packing Company, Inc. paid the sum of $465,000.00 to purchase the capital stock of Farris Plywood Company and alleged that it would not have purchased the stock had not the president and principal stockholder as a condition of the sale agreed not to compete with Farris Plywood Company in the area in the business operated in by Farris for a period of five years.

The **Fox** case dealt with an employment contract and not with the sale of a business. A later case, **Taylor Freezer Sales Company Inc. v. Sweeden Freezer Eastern Corporation** (1968), 225 Ga. 160, 160 SE2d 356, decided March 7, 1968, also dealt with an employment contract. The Supreme Court of Georgia there reiterated the rule referred to above that whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the court and held as previously pointed out:

> " 'Greater latitude is allowed in those covenants relating to the sale of a business, or dissolution of a partnership than in those covenants ancillary to an employment contract.' "

THE PUBLIC POLICY OF GEORGIA HAS NOT BEEN IGNORED

The Trial Court and the Fifth Circuit Court of Appeals did not ignore the public policy of Georgia in this case. The District Judge heard evidence in the case, argument of counsel and rendered detailed findings of fact and conclusions of law in which specific reference was made to the public policy of Georgia established in the statutory and judicial law of the State. The Circuit Court of Appeals had the benefit of briefs filed by the parties, the record and transcript in the case, and heard oral argument of counsel. The opinion of the Fifth Circuit reaffirmed its previous decision that the contract from the seller not to compete with his buyer was valid under Georgia law and that under the evidence heard by the District Court, that The Day Companies, Inc. was entitled to as much relief "if not more" than was granted by the District Court.

There was some intimation in the opinion that if The Day Companies had filed a cross appeal, the Circuit Court might have held that Respondent was entitled to greater relief than granted.

CONCLUSION

This case does not involve an instance where in order to obtain employment a prospective employee signs a contract that he will not compete with his employer over a certain period of time within a designated area. This case involves an able businessman who dealt at arms length in the sale of the stock he and members of his family owned in a corporation which he had developed. He agreed not to compete with the corporation which he was selling. He and his family accepted the sum of $465,000.00 in payment of the stock, and in less than ninety (90) days, he had violated his written agreement. The trial court properly enjoined further violation of the covenant by the defendants.

The United States Court of Appeals for the Fifth circuit has twice reviewed this matter and held that the contract in question is binding. In the most recent opinion, it held that The Day Companies, Inc. was entitled to the injunctive relief granted by the trial court. This Court has already denied Certiorari in this case in one instance.

The Petition for a Writ of Certiorari should be denied as it is manifest there is no ground for granting such a Writ in this case.

Respectfully submitted

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